IN THE

Supreme Court of the United States

October Term, 1919

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ESSANAY FILM MANUFACTURING COMPANY,
Appellant,

against

WILLIAM R. KANE,
Appellee.

APPELLANT'S BRIEF

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IN THE

Supreme Court of the United States

October Term, 1919

ESSANAY FILM MANUFACTURING COMPANY, *Appellant,* *against* WILLIAM R. KANE, *Appellee.*	**No. 967**

APPELLANT'S BRIEF.

This is an appeal from an order of the United States Circuit Court of Appeals for the Third Circuit which affirmed a final decree whereby the District Court of the United States for the District of New Jersey dismissed the appellant's bill of complaint after final hearing on bill and answer.

The action was brought by the appellant to enjoin the appellee from enforcing an interlocutory judgment which he had obtained against the appellant in the Supreme Court of the State of New Jersey and from enforcing a final judgment which he threatened to obtain and enforce against appellant.

Appellant sought relief upon the ground that the judgment obtained was void for want of service of process upon the appellant.

The jurisdiction of the District Court was invoked upon the ground that the matter in controversy involved more than the requisite amount and arose between citizens of different States, and also because the controversy arose under that portion of the Federal Constitution which

provides that no State shall deprive any person of property without due process of law.

Upon final hearing on bill and answer the learned District Judge dismissed the bill upon the ground that, since the judgment complained of by the appellant was only interlocutory in character, the District Court was prohibited by Section 265 of the Judicial Code from staying proceedings in any court of a State and that a restraint upon the parties to such a suit prior to entry of final judgment would be a violation of that section of the Judicial Code (R. 27). The bill was adjudged to be premature and was dismissed.

Upon appeal, the Third Circuit Court of Appeals affirmed the District Court, and thereafter in due season an appeal to this Court was duly allowed (R. 37) to review this order of affirmance.

Facts.

In December, 1910, the appellant, an Illinois corporation, engaged in the production of motion pictures in Illinois and in California, desired to institute a replevin suit in the courts of the State of New Jersey, and it was then advised that to enable it to do so it must first file a statement similar to those then required to be filed by foreign corporations desiring to do business within the State of New Jersey.

Accordingly, it filed such a statement, designating Durant Church as the agent upon whom process against the appellant might be served.

But the appellant did not then or at any time thereafter ever do or transact any business of any kind or character within the State of New Jersey, and it never formally revoked its designation of Mr. Church as its agent for the purpose stated.

About September 29, 1915, the appellant made a contract in the City of New York with the appellee for the purchase of the world motion picture rights in 100 stories

to be selected by the appellant from 1,600 stories contained in the issues of a periodical publication known as The Black Cat Magazine.

To enable the appellant to choose the 100 picturable stories, the appellee shipped the magazines from the State of New Jersey to the appellant at Chicago, via one or more express companies of his own selection.

After the magazines reached Chicago, the appellant examined them, but was unable to find among the number the 100 picturable stories for which it had contracted.

For reasons not material to the present inquiry, the appellant failed to return the magazines to the appellee upon his demand, and about July 9, 1917, the appellee instituted a suit in the Supreme Court of the State of New Jersey for the recovery of $20,000 damages claimed to have been sustained by reason of the appellant's alleged conversion of the magazines in question.

The only service of process attempted was the mailing of copies of the summons and complaint to the Secretary of State of New Jersey, which service appellee claims was made pursuant to Section 2 of Chapter 124 of the New Jersey Laws of 1900 (R. 18).

On July 10, 1917, the Secretary of State mailed these papers to Durant Church, 828 Broad Street, Newark, as the alleged agent of the appellant, but they were subsequently returned to him by the postal authorities marked "Not found," and have since remained in possession of the Secretary of State.

The appellant knew nothing of these matters until the appellee, about October 29, 1917, while at the appellant's office in Chicago, informed the president of the appellant that he, the appellee, had obtained a judgment for $20,000 against appellant in the suit which he had instituted against the appellant and that he would arrange to enforce the judgment in Chicago against the appellant unless the appellant was willing to settle his alleged claim by the payment at that time of $16,000 (R. 5, 6).

The appellee alleges that on this occasion he informed

the appellant (R. 18, 19) "that judgment was about to be entered for $20,000 against the complainant in the State of New Jersey, and that he was taking proper procedure to have said judgment transferred to the State of Illinois for the purpose of issuing execution for the recovery of said amount."

Thereafter the suit proceeded to an interlocutory judgment (R. 27), and on November 13, 1917, the appellant filed its bill in the District Court of the United States for the District of New Jersey to enjoin its enforcement alleging all of the foregoing facts, that it did not do and never had done any business within the State of New Jersey; that it had never been served with process in the suit; had never voluntarily appeared therein, and that its enforcement would deprive the appellant of its property without due process of law, in violation of the 14th Amendment of the Federal Constitution.

The result already indicated followed.

The assignments of error present for decision here the questions:

(1) Did the District Court have jurisdiction to grant the relief prayed for?

(2) Was the bill prematurely brought?

(3) May an Illinois corporation foreign to the State of New Jersey which in 1910 files a designation of a specified resident agent in New Jersey as part of its application for leave to do business within that State, but which subsequently abandons the privilege and never in fact transacts any business within the State, be made amenable *in personam* involuntarily in the year 1917 to the process of the courts of the State of New Jersey upon a transitory cause of action *in tort* accruing outside of New Jersey, by mailing a copy of the process intended for it to the Secretary of State?

We respectfully contend that the District Court had jurisdiction and should have exercised it; that the bill

was not prematurely brought and that the proceedings in the State Court of New Jersey are not based upon due process of law in the constitutional sense, and hence that they are void, and that the appellant is, notwithstanding Section 265 of the Judicial Code, entitled to a perpetual injunction restraining the attempted enforcement of the interlocutory judgment already entered and of any final judgment which the appellee threatens to enter and enforce against the appellant.

POINT I.

The District Court had jurisdiction to grant the relief prayed for.

The District Court's jurisdiction is, we think, conclusively established by *Simon* v. *Southern Railway*, 236 U. S., 115.

Part of the headnote of this case is as follows:

> "United States Courts, by virtue of their general equity powers, have jurisdiction to enjoin the enforcement of a judgment obtained by fraud or without service.
>
> In the absence of service of process a person named as defendant can no more be regarded as a party than any other member of the community.
>
> A judgment against a person on whom no process has been served is not erroneous and voidable, but upon principles of natural justice, and also under the due process clause of the Fourteenth Amendment, is absolutely void.
>
> The jurisdiction of the United States Courts cannot be lessened or increased by state statutes regulating venue or establishing rules of procedure.
>
> While section 720, Revised Statutes, prohibits United States Courts from staying proceedings in a State Court, it does not prevent them from depriving a party of the fruits of a fraudulent judgment, nor from enjoining a party from using

> that which he calls a judgment, but which is, in fact and in law, a mere nullity and absolutely void for lack of service of process. *Marshall* v. *Holmes*, 141 U. S., 589."

The *Simon* case is the last expression on the subject in this Court, so far as we know.

It was fully discussed by the Supreme Court in the case of *Pennsylvania Fire Insurance Company* v. *Gold Issue Mining Company*, 243 U. S., 93, and was cited with approval as recently as 247 U. S., 214-221, in *Looney* v. *East Texas Railroad Company*.

We find it difficult to direct attention to any more convincing authority than the *Simon* case upon this question.

As indicated in the headnote and in the opinion, the restraint which a Federal Court may impose upon a litigant who seeks to enforce a judgment of a State Court which is not based on the service of due process, *is not the restraint of judicial proceedings in State Courts which is contemplated and prohibited by Section 720 of the Revised Statutes, Section 265 of the Judicial Code.*

We see nothing in the opinion of this Court in the *Simon* case which indicates that this Court observed the slightest difference so far as Federal jurisdiction is concerned between restraining the enforcement of an interlocutory and a final judgment.

Yet the learned District Court was of the opinion that there is a jurisdictional difference and that that difference is "vital," and the Circuit Court of Appeals concurred in this view.

This Court decided in the *Simon* case in effect that a Federal Court might lawfully enjoin *parties* from further activity in proceedings in a State Court, although a Federal Court might not enjoin or stay the *State Court* itself or the proceedings which, of course, are controlled by the Court and not by the parties.

We think it plain that *parties* within the jurisdiction of a Federal Court may be enjoined in a proper case from reaping the unjust fruits of an alleged service of process void under the Constitution, even at the threshold of a pending litigation and long before a judgment of any kind exists.

The *threat* to proceed to final judgment and execution is ample to support the injunction. In reality, the chief difference between the interlocutory and the final judgment resolves itself into one of time.

At one date an interlocutory judgment is alone obtainable. Later, in due course, it will ripen into a final adjudication.

An interlocutory judgment adjudges and settles the controversy between the parties—one wins and the other loses thereby. The appellee was adjudged to have a lawful cause of action against the appellant. The appellant was adjudged to have converted to its own use property of the appellee of the alleged value of $20,000. This stigma is fixed and placed upon the appellant and the amount of the appellee's damage is alone uncertain. Yet the learned courts below are of the opinion that the appellant has not been and will not be injured until the appellee's threat of further proceedings is carried out. The learned District Court said: "If no further proceedings are taken no possible legal injury can result to the plaintiff here" (R. 32).

This, we think, is plainly erroneous. The injury is plain and has been clearly pointed out.

Moreover, if, as this Court decided in the *Simon* case, an injunction which only operates on the parties and makes no attempt to stay judicial proceedings in a State court, does not violate the prohibition contained in Section 265 of the Judicial Code—the same kind of an injunction cannot be within the prohibition simply because of the particular kind of judgment which has been entered in the State court. The decision, as we understand it,

was not based upon any difference in the kinds of judgments which might be entered in a State court. It was based on the very obvious fact that *parties* are not *judicial proceedings* and the prohibition against staying the latter does not in any way impair the right to restrain the former.

It follows that the District Court had jurisdiction.

POINT II.

The Suit Was Not Prematurely Brought.

As part of the foregoing argument indicates, the chief difference between the interlocutory and the final judgment is one of time and amount.

Now, as we understand the decision of the learned District Court, it virtually concedes the appellant's right on the facts stated, to the injunction *after final* judgment against it is obtained.

The decision appears to be based on the principle that the danger of injury resulting from the enforcement of a final judgment is too remote to be enjoined, even though the appellee has progressed so far as entering an interlocutory judgment and will, admittedly, if not restrained, proceed to carry out his threat to enter final judgment and collect upon it in the State of Illinois.

We are impressed with the conviction that *the time* when the appellee may take the final steps necessary to execute the State court's void process is thus made to transcend in importance all other considerations, including the appellant's rights and the orderly administration of justice, for obviously, unless the appellant can establish a watch upon the activities of the appellee and ascertain the exact moment he enters final judgment, and then, unless it can dash into court and obtain an injunction before the appellee can seize its property, the appellant is deprived of any benefit resulting from the right to seek

the protection of its constitutional guarantees in a Federal court as it endeavored to do below.

Thus, the orderly administration of justice degenerates into an unseemly race between the appellant and a New Jersey sheriff.

We respectfully submit that Federal jurisdiction cannot be measured by hours or seconds or by any other period of time. Time is not the test.

The threat to proceed to final judgment supports the injunction quite as well as the actual entry of the judgment would, and it cannot be necessary to remain passive while the appellee, by more celerity in the execution of void judicial process, renders it extremely difficult if not impossible for the appellant to obtain the protection of the Federal courts.

POINT III.

The judgment rendered by the Supreme Court of New Jersey is void, because the only service relied upon was that made upon the Secretary of State, who was not the appellant's voluntarily appointed agent, and the case is one in which the appellant never transacted business within that State, and the cause of action accrued, if at all, outside of the State of New Jersey.

In order to set forth clearly the grounds upon which these contentions rest, it becomes necessary to analyze the leading authorities dealing with the amenability of a corporation to the jurisdiction of the courts of a State other than that of its origin.

Formerly the rule was that a corporation could not be sued in an action for the recovery of a personal demand outside of the State in which it was chartered (*St. Clair* v. *Cox*, 106 U. S., 350).

In States other than the State of origin, legal proceedings against it were confined to litigation affecting such property belonging to it as could be found within such State (*Pennoyer* v. *Neff*, 95 U. S., 714).

The manifest inconvenience and injustice resulting from this doctrine of legal exemption from suit in the foreign State, led the Legislatures of the several States to legislate concerning it.

Statutes were passed which, in many instances, required a foreign corporation, engaged in business in a State other than that of its origin, to consent to the institution of suits against it in the States where it transacted business.

Some States were content with a provision requiring a foreign corporation, before it might lawfully transact business within its domain, to designate a resident agent upon whom service of process against it might be made.

Other States went further, and provided that if the foreign corporation failed to designate such an agent, then service might be made against the corporation by delivering process intended for it to some specified officer of the State authorized by law to receive it.

A great volume of judicial decisions construing these various statutes in due course resulted, and it has now become difficult to harmonize and reconcile some of the decisions of the State courts and of the Federal courts upon the subject.

The exact extent or scope of the consent on the part of the foreign corporation to be sued in the foreign State became the subject of judicial consideration and determination.

This consent is inferred and results only from the company's transaction of business in a foreign State and from its partial or complete compliance with the State statutes, which require it to do certain things as a condition precedent to the right to transact business there.

Notwithstanding the difficulties which arose in interpreting these State statutes, the law, based largely upon the doctrine of agency, found harmonious expression in the decisions of this Court.

The doctrine that a corporation could not migrate from the State of its domicile and could be sued only in that State, was abandoned, and in its place appeared the doctrine that where in fact the corporation did migrate to other jurisdictions and there transacted its business through its own voluntarily appointed agents, it might be subjected to suits in that locality, provided jurisdiction was obtained in the manner prescribed by local statute.

Whatever may be the inference to be drawn from the application of a corporation for a license to authorize it to transact business within a foreign State, the courts did not base their decision upon anything so vague or nebulous as the intent or purpose of a corporation in making such an application.

The crucial and fundamental test of jurisdiction and amenability to State process was and always has been: Did the corporation transact business within the foreign State?

If it did not, then, any personal judgment rendered against it, unless based upon a voluntary appearance or actual consent to be sued, no matter how service is made, is void.

If it did, the only material inquiry is whether the person upon whom service was made so far represented the corporation in the foreign State that he properly may be held in law an agent to receive such process in behalf of the corporation.

Mutual Life Ins. Co. v. *Spratley*, 172 U. S., 602, 610.

A.

As the appellant never transacted business within the State of New Jersey, it was not amenable to the jurisdiction of the courts of that State.

All of the authorities plainly demonstrate that where a corporation does no business within a foreign State, service upon its officers or its agents, or upon any State official, even though named by statute, is insufficient to give the courts of that State jurisdiction over the corporation so attempted to be sued.

Toledo Railways Co. v. *Hill*, 244 U. S., 49;
Philadelphia & Reading Railway v. *McKibbin*, 243 U. S., 264;
Riverside Mills v. *Menefee*, 237 U. S., 189;
Tyler Company v. *Ludlow Taylor Wire Company*, 236 U. S., 723;
Peterson v. *Chicago, R. I. & Pac. Railway*, 205 U. S., 364;
Green v *Chicago, Burlington & Quincy Railway*, 205 U. S., 530;
Old Wayne Life Association v. *McDonough*, 204 U. S., 8;
Conley v. *Mathieson Alkali Works*, 190 U. S., 406;
Goldey v. *Morning News*, 156 U. S., 518;
Cooper Manufacturing Co. v. *Ferguson*, 113 U. S., 727.

The New Jersey decisions are in accord with this rule. For instance, *Groel* v. *United Electric Co. et al.*, 69 N. J. Eq., 397, on the authority of which the appellee herein relied below to sustain the validity of the judgment he obtained, involved a suit by a minority stockholder brought to recover a secret profit made by one of the defendants therein.

The bill alleged that the transaction in question occurred in March, 1899, and that it transpired in the State of New Jersey.

The defendant United Gas and Improvement Co. was a Pennsylvania corporation, which, in July, 1894, qualified to transact business in New Jersey, designated a resident agent and thereupon actually transacted business therein until November, 1899, at which time it ceased to do business there, revoked the authority of its designated agent and removed from the State. Process, however, was served upon that agent in October, 1903, and the service was held to be binding upon it.

The Court said, at pages 411, 412, 413:

> "To hold that a corporation might by comity be admitted within other sovereignties, and might therein make contracts and transact business, and that those in such other sovereignties, with whom it contracted and did business must seek it at its home jurisdiction, was to create an unreasonable and unjust preference in favor of the artificial being.
>
> " 'This doctrine of the exemption of a corporation from suit in a state other than that of its creation was the cause of much inconvenience and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. * * * Incorporated under the laws of one State, they carry on the most extensive operations in other states.' *St. Clair* v. *Cox*, 106 U. S., 350; 27 L. Ed., 222 (1882).
>
> "The remedy was applied by holding that when a foreign corporation came within the boundaries of a sovereignty other than that of its creation, *and there made contracts and transacted business*, it was answerable *there for causes of action there arising*, provided service was made there upon some *actual representative of* the foreign corporation. * * *

> "It being entirely within the powers of each State to exclude foreign corporations, or to admit them within its borders upon conditions, each State has the right to prescribe a mode of service of process upon foreign corporations, which will subject them to the jurisdiction of its courts, provided, of course, that such mode is not unreasonable or contrary to the principles of natural justice. * * *
>
> "There were always, therefore, two questions to be decided before the merits of any such controversy could be reached for determination. *First, was the artificial being within the State, transacting business—i. e., was it 'found' therein? Second, was the process served upon an actual representative of the corporation in accordance with the provisions of the law of that jurisdiction?*"

These quotations make it clear that this case cited by the appellee does not in any way vary the general rule set forth above, for it will be observed that when the cause of action sued upon therein accrued, the United Gas and Improvement Co. was doing business in the State of New Jersey, and thereby the company became amenable to the jurisdiction of the New Jersey courts.

A reading of the Corporation Law of the State of New Jersey discloses that the Legislature intended its provisions to apply only to those foreign corporations which should actually do business within the State.

Section 96 (2 Compiled Statutes of New Jersey. "Corporations." [P. L. 1896, p. 307]), reads:

> "Corporations subject to act.—Foreign corporations *doing business in this state* shall be subject to the provisions of this act, so far as the same can be applied to foreign corporations."

Section 97 of the same compilation provides:

> "Every foreign corporation, except banking, insurance, ferry and railroad corporations, *before*

transacting any business in this state, shall file in the office of the secretary of state a copy of its charter or certificate of incorporation, attested by its president and secretary, under its corporate seal, and a statement attested in like manner of the amount of its capital stock authorized and the amount actually issued, the character of the business which it is to transact in this state, and designating its principal office in this state and an agent who shall be a domestic corporation or a natural person of full age actual resident of this state, together with his place of abode, upon which agent process against such corporation may be served, and the agency so constituted shall continue until the substitution, by writing, of another agent; upon the filing of such copy and statement the secretary of state shall issue to such corporation a certificate that it is authorized to transact business in this state, and that the business is such as may be lawfully transacted by corporations in this state, and he shall keep a record of all such certificates issued." (Pamphlet Laws 1896, p. 307.)

Section 98 of the same compilation provides:

"Certificate of authority to do business prerequisite to right to maintain actions on contracts; exception * * *. *Until such corporation so transacting business in this state* shall have obtained said certificate of the secretary of state, it shall not maintain any action in this state, upon any contract made by it in this state; provided, that nothing herein shall prevent the enforcement of any contract made prior to the 14th day of March, One thousand eight hundred and ninety-five." (Pamphlet Laws 1896, p. 308.)

An excerpt from Section 99 reads as follows:

"Agent for service of process; death, removal or disqualification; appointment of successor; revocation of authority to do business on failure to appoint; process may be served on secretary of state; costs.—If said agent shall die, remove from

the state or become disqualified, *such* corporation shall forthwith file in the office of the secretary of state a written appointment of another agent, attested in the manner above provided, and in case of the omission to do so within thirty days after such death, removal or disqualification, then the secretary of state, upon being satisfied that such omission has continued for thirty days, shall, by entry on the record thereof, revoke the certificate of authority to transact business within this state; *any process against such corporations in actions upon any liability incurred within this state before the designation of another agent may, after such revocation, be served upon the secretary of state;* at the time of such service the plaintiff shall pay to the secretary of state for the use of the state two dollars, to be included in the taxable costs of such plaintiff, and the secretary of state shall forthwith mail a copy of such process to such corporation at its general office or to the address of some officer thereof, if known to him."

Section 100 provides:

"Transaction of business without complying with laws; penalty.—Every foreign corporation transacting business in any manner whatsoever, directly or indirectly, in this state, without having first obtained authority therefor, as hereinabove provided, shall for each offense forfeit to the state the sum of two hundred dollars, to be recovered with costs in an action prosecuted by the attorney general in the name of the state." (Pamphlet Laws 1896, p. 308.)

The only pretended authority for the kind of service relied upon by the defendant is said to be Paragraph 2, Section 7, of Chapter 124 of the Laws of 1900.

This chapter is the same as Section 43a of the Act entitled "An Act concerning corporations, revision of 1896" (2, Compiled Statutes of New Jersey, p. 1626).

As there is no Section 7 to Chapter 124 of the Laws of 1900, we take it that the defendant relies upon Section 2 of that chapter, which reads:

"In case any domestic corporation or any foreign corporation authorized to transact business in this state, shall fail to file such report within the time required by this section, or in case the agent of any such corporation designated by any such corporation as the agent upon whom process against the corporation may be served shall die, or shall resign, or shall remove from the state, or such agent cannot with due diligence be found, it shall be lawful, while such default continues, to serve process against any such corporation upon the secretary of state, and such service shall be as effective to all intents and purposes as if made upon the president or head officer of such corporation, and within two days after such service upon the secretary of state as aforesaid, it shall be the duty of the secretary of state to notify such corporation thereof by letter directed to such corporation at its registered office, in which letter shall be enclosed a copy of the process or other paper served, and it shall be the duty of the plaintiff in any action in which said process shall have issued to pay the secretary of state, for the use of the state, the sum of three dollars, which sum shall be taxed as part of the taxable costs in said suit if the plaintiff prevails therein; the secretary of state shall keep a book to be called 'process book,' in which shall be recorded alphabetically, by the name of the plaintiff and defendant therein, the title of all causes in which processes have been served upon him, the test of the process so served and the return day thereof and the date and hour when such service was made."

The provisions of that section of the statute, however, appear to have been repealed by the Chapter 243 of the Laws of 1916. The text of this chapter is:

"BE IT ENACTED by the *Senate and the General Assembly of the State of New Jersey:*

1. Every corporation heretofore or hereafter organized under the laws of this State, and every foreign corporation authorized to transact business in this State, shall maintain a principal office

within the State of New Jersey, and an agent in charge of said principal office upon whom process against the corporation may be served.

2. Whenever the principal office of a corporation organized under the laws of this State or a foreign corporation authorized to transact business in this State, shall be removed, or whenever the agent shall die, resign or be removed, the Board of Directors shall forthwith file in the office of the Secretary of State a certificate under the seal of the president and secretary, setting forth the removal of the principal office, or a certificate under seal of the aforesaid officers, setting forth the name of the new agent upon whom process may be served. If such certificate is not so made and so filed, the corporation shall forfeit to the State the sum of Two hundred dollars, to be recovered with costs, in an action of debt, to be prosecuted by the Attorney General, who shall prosecute such actions whenever it shall appear that this section has been violated; *provided, however,* that this Act shall not apply to authorized insurance corporations which make annual reports to the Commissioner of Banking and Insurance of this State.

3. Upon the filing of the certificate mentioned in the above section, the corporation shall pay to the Secretary of State a fee of one dollar.

4. All Acts and parts of Acts inconsistent with this Act are hereby repealed, and this Act shall take effect immediately.

Approved March 21, 1916."

Clearly Chapter 243 of the Laws of 1916 covers the matters identical to those set forth in Section 2 of Chapter 124 of the Laws of 1900, and the respective provisions are inconsistent. Hence by force of Section 4 of the former statute, Section 2 of Chapter 124 of the Laws of 1900 must be considered as repealed.

The Universal test, then, of due process, in New Jersey as well as elsewhere, is whether or not the for-

eign corporation was transacting business within the State at the time the cause of action sued upon accrued.

Isolated acts of business, however, such as the negotiation of a mortgage or the execution of a contract will not suffice to bring the foreign corporation within the purview of the laws of the other State.

Clews v. *Woodstock Iron Co.*, 44 Fed., 31.

And the prosecution or the defense of suits in the courts of that state is not regarded as the doing of business within such state.

American Loan & Trust Co. v. *East & West R. Co.*, 37 Fed., 242.

The New Jersey decisions are similar in effect. These decisions hold that foreign corporations may, without complying with any of the provisions of the statute relating to the licensing of such corporations, bring actions, in the tribunals of that State, on contracts made in foreign states;

Faxon v. *Lovett Co.*, 69 N. J. L., 128;
Slayton-Jennings Co. v. *Specialty Paper Box Co.*, 69 N. J. L., 214;
MacMillan Co. v. *Stewart*, 69 N. J. L., 676;

or to recover amounts due on mortgages held by them on property situated in New Jersey.

Manhattan, etc., Loan Association v. *Massarelli*, 42 Atl., 284.

According to the test established, the New Jersey courts never acquired jurisdiction over the appellant, for it never actually transacted business within that State.

It is true, in 1910, as we have seen, the appellant, wishing to institute a replevin suit in the New Jersey courts, was advised to and did file a statement with the Secretary of State of New Jersey, in which, aside from

designating Durant Church as its agent upon whom process might be served, it expressed its intention to transact business there.

But this declaration on the part of the appellant of its intention to do business within the State of New Jersey certainly cannot be regarded as the equivalent of the actual transaction of business therein.

The expressions of the Supreme Court in the very recent case of *Phila. & Reading Ry.* v. *McKibbin*, 243 U. S., 264 (*supra*), conclusively establishes this to be so.

In that case the Court said, pages 265-6:

> "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is *doing* business with the State in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the State the process will be valid only if served upon some authorized agent. *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S., 218, 226. Whether the corporation was doing business within the State and whether the person served was an authorized agent are questions vital to the jurisdiction of the court. A decision of the lower court on either question if duly challenged is subject to review in this court; and the review extends to findings of fact as well as to conclusions of law. *Herndon-Carter Co.* v. *Norris, Son & Co.*, 224 U. S., 496; *Wetmore* v. *Rymer*, 169 U. S., 115. The main question presented here is whether the plaintiff-in-error—defendant below—was doing business in New York. * * *"

B.

The service upon the Secretary of State is void since the cause of action sued upon accrued outside of the State of New Jersey.

Judicial authority has established the following postulates as a logical sequel to the fundamental rule that a corporation which has not transacted business within a foreign State, is not amenable to the jurisdiction of the courts of that State *in personam.*

If the corporation does business in the foreign State, then:

(1) If it transacts such business by authority of the State, service made upon the officers of the corporation or its duly appointed agent is sufficient to give the State courts jurisdiction of suits against the corporation based upon any transitory cause of action.

Ohio River Contract Company v. *Gordon,* 244 U. S., 68;
International Harvester Co. v. *Kentucky,* 234 U. S., 579;
Mutual Life Insurance Company v. *Spratley,* 172 U. S., 602;
Barrow Steamship Company v. *Kane,* 170 U. S., 100.

(2) If the corporation does business, without the State's authorization, service made upon an officer of the corporation or its agent, found within the State, is

sufficient to confer jurisdiction over the corporation in suits upon any transitory cause of action.

Washington-Virgina Railway v. *Real Estate Trust*, 238 U. S., 185;
St. Louis & S. W. Railway v. *Alexander*, 227 U. S., 218;
Herndon-Carter Company v. *Norris & Co.*, 224 U. S., 496;
Commercial Mutual Accident Company v. *Davis*, 213 U. S., 245;
Lumbermen's Insurance Company v. *Meyer*, 197 U. S., 407.

(3) When the law of the foreign State designates a State officer upon whom it assumes to authorize the service of process directed against foreign corporations doing business within the State, in the event that the officers or duly appointed agent of the corporation cannot with due diligence be found, such service is valid *if the corporation is transacting business in such State*, provided the cause of action accrued within the State, but it is void if the cause of action accrued outside of the State.

Mutual Reserve, etc., Association v. *Phelps*, 190 U. S., 147;
Simon v. *Southern Railway*, 236 U. S., 115.

(4) If, however, it appears that the corporation has by a duly executed power of attorney voluntarily appointed as its agent the State officer designated or prescribed by statute, and the courts of last resort of that State, in construing such statute, have held the corporation to be amenable to suit in that jurisdiction upon a transitory cause of action, irrespective of where it accrued, that ruling will not be disturbed by the Supreme Court of the United States.

Pennsylvania Fire Insurance Co. v. *Gold Issue Mining Company*, 243 U. S., 93.

(5) But notwithstanding this, even where the State officer has been voluntarily appointed as the agent of the corporation, service upon him will be void, in suits involving causes of action which accrued outside of the State, *after the corporation has ceased to do business within that State.*

Hunter v. *Mutual Reserve Life Insurance Co.*, 218 U. S., 572.

(6) And even if the corporation has done business in the State and has designated an agent whose appointment stands unrevoked, jurisdiction cannot be obtained over such a corporation by service of process upon such agent in a case in which the cause of action sued upon accrued outside of the State in which suit is brought.

Chipman, Ltd. v. *Jeffery Co.*, 251 U. S., 373, 378.

In the *Simon* case (*supra*), exactly the same practice as that adopted by the complainant here was successfully followed.

The Southern Railway Co., against which Simon had obtained a judgment in Louisiana without any service of process, except service upon the State official designated to receive it by the law of Louisiana, applied to the Federal Court to restrain Simon from enforcing the judgment so obtained against it.

Mr. Justice LAMAR, delivering the opinion of the Court, said (pp. 129, 130, 132):

> "The broader the ground of the decision here, the more likelihood there will be of affecting judgments held by persons not before the Court. We therefore purposely refrain from passing upon either of the propositions decided in the courts below, and without discussing the right to sue on a transitory cause of action and serve the same on an agent voluntarily appointed by the foreign corporation, *we put the decision here on the special*

fact, relied on in the Court below, that in this case the cause of action arose within the State of Alabama, and the suit therefor, in the Louisiana court, was served on an agent designated by a Louisiana statute.

"Subject to exceptions, not material here, every State has the undoubted right to provide for service of process upon any foreign corporation doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. *Mutual Reserve Ass'n.* v. *Phelps*, 190 U. S., 147; *Mutual Life Ins. Co.* v. *Spratley*, 172 U. S., 603. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the State enacting the law. Otherwise, claims on contracts wherever made and suits for torts wherever committed might by virtue of such compulsory statute be drawn to the jurisdiction of any State in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extra-territorial extension of jurisdiction, by virtue of the power to make such compulsory appointments, could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in *Old Wayne Life Association* v. *McDonough*, 204 U. S., 22, that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other States. * * *

"From the principle announced in that case it follows that service under the Louisiana statute would not be effective to give the District Court of New Orleans jurisdiction over a defendant as to a cause of action arising in the State of Alabama. The service on the Southern Railway, even if in compliance with the requirements of Act 54, was not that kind of process which could give the court jurisdiction over the person of the defendant for a cause of action arising in Alabama. As the company made no appearance, the default judgment was void. Being void, the plaintiff ac-

> quired no rights thereby and could be enjoined by a Federal Court from attempting to enforce what is a judgment in name, but a nullity in fact. This conclusion makes it unnecessary to consider whether the Southern Railway was doing business in Louisiana. It also makes it unnecessary to consider the question of fact as to whether the judgment was void because of fraud in its procurement."

Though drafted many years before the rendition of the opinion in the *Simon* case, the Corporation Laws of the State of New Jersey are in accord with the law annunciated in that case.

Thus, by the provisions of Section 99 (P. L. 1896, p. 308, *supra*), it is expressly specified that process may be served on the Secretary of State only when service cannot be made on the voluntarily designated resident agent of a foreign corporation, and then only "*in actions upon any liability incurred within this State.* * * *"

It is clear then, as we have stated, that where it appears that the corporation does or did transact business within a foreign State, the jurisdictional issue is, may the individual served properly be held in law an agent to receive such process in behalf of the corporation?

If we now apply the test expressed in the *Simon* case to the case at bar, it becomes evident that it must be shown that the appellant, when it filed its application with the Secretary of State of New Jersey, also executed a power of attorney appointing that officer as its agent upon whom service might be made, and that the appellee's cause of action arose in New Jersey, in order to render the judgment of the Supreme Court of New Jersey against the appellant a valid one.

The appellant executed no such power of attorney.

The service was admittedly made by mail only upon the Secretary of State, and it cannot be successfully disputed that the cause of action arose outside of New Jersey.

The facts are that on or about the 11th of October, 1915, and again on or about the 3rd of November, 1915,

the appellee shipped to the appellant at Chicago, via one or more express companies of his own selection, certain copies of the Black Cat Magazine.

While the appellant was the consignee, it had not designated the express companies to which the magazines were to be delivered for shipment.

Moreover, the arrangement between the parties did not contemplate a sale of the magazines themselves, nor for that matter even of the stories contained therein.

It provided for the sale of the motion picture rights in 100 stories after the appellant had had an opportunity of reading all the stories contained in the magazines and of selecting the ones it thought suitable for motion picture purposes.

These facts demonstrate that the carriers and the express companies concerned were solely the agents of the appellee.

In *Rodgers* v. *Phillips*, 40 N. Y., 519, the Court said, at pages 525, *et seq.*:

> "The question in this case, therefore, is whether such an acceptance of the coal by the defendants was shown as placed it at their risk at the time when it was lost by the sinking of the vessel it was laden upon. And for the purpose of considering and deciding it, this case must be distinguished from those where the property contracted to be sold was delivered to a particular carrier designated and selected by the vendee for the purpose of receiving and accepting it. For, in those cases, the carrier, by the act of the vendee became his agent, and bound him by the receipt and acceptance of the property. * * * This case differs from those in the circumstance that no such designation or selection was made by the defendants. The carrier to whom the property was delivered, to be carried to the defendants, was selected by the plaintiff. * * * There was nothing, therefore, in the case from which the defendants could be deemed to have accepted the coal at that time (upon plaintiff's delivery to carrier). It consequently continued to be the plaintiffs' property, remaining at their risk, and it was their loss when the vessel sunk after it had been laden

> on board of her. And if the carrier became liable for the loss, his liability was to the plaintiffs, not to the defendants. That a mere delivery of property to a carrier selected to receive and carry it by the vendors, will, in no legal sense, constitute an acceptance of it by the vendee. * * *"

Hence, as long as the magazines remained in the possession of the express companies, they were constructively within the possession of the appellee.

And as they remained in the former's possession until they were delivered to the appellant at Chicago, no conversion of them, as alleged, could have occurred in New Jersey.

In every case in which service upon a State official has been upheld it has appeared that the corporation did business within the State.

The cases show that this type of service is upheld when a formal power of attorney has been executed by the corporation attempted to be served, specially designating the State official as it agent to receive process in its behalf.

> *Pennsylvania Fire Insurance Company* v. *Gold Issue Mining Company,* 243 U. S., 96.

Where a corporation does business in a State without authority and fails or refuses to designate its own agent, it has been intimated that *as to causes of action which accrue within the State* the corporation would not be permitted to avoid service by setting up its own wrongful act in transacting business within a State without complying with its laws, and as to such cases service upon a State official might be sanctioned.

See dicta in *Smolik* v. *Philadelphia & Reading Coal & Iron Co.,* 222 Fed., 148, cited with approval in *Pennsylvania Fire Insurance Company* v. *Gold Issue Mining Company,* 243 U. S., 96.

But even if a corporation did business within the State without authority and had ignored and failed and refused to comply with the local statutes requiring it

to designate its own representative or a State official as its agent, service of process upon the State official in such cases *is void as to causes of action which accrue outside of the State where service is made.*

Old Wayne Mutual Life Association v. *McDonough*, 204 U. S., 8;
Simon v. *Southern Railway Company*, 236 U. S., 115;
Chipman, Ltd. v. *Jeffery Co.*, 251 U. S., 373, 378.

In the case at bar the appellant violated no law of the State of New Jersey.

It prepared to do business lawfully within the State, but it never transacted any business there.

Consequently, it never came under the legislative jurisdiction of the State.

The cause of action upon which it has been sued did not arise within the State, and hence valid service of process could not be made against it by serving a State official under a State statute, which, properly construed, clearly applies only to corporations transacting business within the State *as to causes of action which accrue therein.*

This is especially clear when it is borne in mind that no relation of agency existed between the complainant and the Secretary of State of the State of New Jersey.

But notwithstanding the fact that the appellant never did business in the State and that it never expressly designated the Secretary of State as its agent to receive the service of process in its behalf, and although the cause of action sued upon accrued elsewhere, the suggestion is made that a consent on its part to be sued in the courts of the State of New Jersey upon causes of action which accrued elsewhere, as well as a consent that process might be served upon the Secretary of State in its behalf, may be implied from the mere fact that in 1910 the appellant applied to the State of New Jersey for a license authorizing it to transact business therein in the future.

We confidently contend that the appellant's application for leave to do business within the State may not reasonably be construed to render it amenable to the service of process through the Secretary of State upon causes of action which accrued beyond the State.

Even if service had been made upon Durant Church, the existence or non-existence of Church's actual agency at the time of service would be open to inquiry, and if the Court found that Church was not, at the time of service upon him, its true agent, the service would be void.

It is only in cases where the Court finds a real agency existent at the time of service that service upon the corporate agent is upheld.

Lafayette Insurance Company v. *French,* 18 How., 404;

Mutual Life Insurance Co. v. *Spratley,* 172 U. S., 602;

Commercial Mutual A. C. C. v. *Davis,* 213 U. S., 245;

Philadelphia & Reading Railway v. *McKibbin,* 243 U. S., 264, 265, 266;

St. Louis Southwestern Railway Company v. *Alexander,* 227 U. S., 218-226;

Barrow Steamship Co. v. *Kane,* 170 U. S., 100-110;

St. Clair v. *Cox,* 106 U. S., 350-356;

United States v. *American Bell Telephone Company,* 29 Fed., 17-37;

St. Louis Wire Mill Co. v. *Consolidated Barb Wire Company,* 32 Fed., 802-804;

Frawley, Bundy & Wilcox v. *Pennsylvania Casualty Company,* 124 Fed., 259-265;

Strain v. *Chicago Portrait Company,* 126 Fed., 831;

Vance v. *Pullman Company,* 160 Fed., 707-712;

Tauza v. *Susquehanna Coal Company,* 220 N. Y., 259, 268, 269.

The appellant was licensed to do, but never had done, business within the State of New Jersey.

Its right to do business in the State of New Jersey in 1917 may well be doubted, since it had never filed any of the reports required by the statutes, maintained any office or designated any real agent to represent it in the State of New Jersey, since it had no business in the State and transacted none there and had no occasion to maintain an office or an agent within the State, and actually maintained neither office nor agent there.

The statutes of New Jersey, which clearly apply only to corporations transacting business in the State, have no application to it.

Under the State statutes all the appellant ever obtained from the State of New Jersey was a revocable license or privilege to transact business within the State.

When its application was filed with the Secretary of State of New Jersey, the appellant became a mere licensee of that State and authorized by it to transact its business lawfully within that State. The license was the subject of revocation by the State and conferred no right of permanent enjoyment upon the appellant.

In this connection, we direct the Court's attention to *Doyle* v. *Continental Fire Insurance Company,* 94 U. S., 535, 539, 540, 541.

In that case, the Court said:

> "The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by the State is always revocable. *Rector* v. *Philadelphia,* 24 How., 300; *People* v. *Roper,* 55 N. Y., 629; *People* v. *Commissioners,* 47 N. Y., 50. The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. *Humphreys* v. *Pegues,* 16 Wall., 244; *Tomlinson* v. *Jessup,* 15 *id.*, 454.
>
> A license to a foreign corporation to enter a state does not involve a permanent right to remain. Subject to the laws and constitution of the United States, full power and control over its

territories, its citizens, and its business, belong to the State."

The doctrine of this case is approved in *Security Mutual Life Ins. Co.* v. *Prewitt,* 202 U. S., 246, 251, 252.

There can be no doubt that this is the true status of the parties.

By the filing of the required statement, the corporation merely applies for leave to enter the foreign State in which it desires to do business.

By that act, the corporation does not bind itself to anything, nor does it waive or agree to waive any of its rights.

In substance, it is nothing more than a formal record of the fact that the corporation has asked the foreign State for permission to transact business within its borders.

If the corporation stops at the filing of the statement and never transacts business within the foreign State and never enters its borders, the conditions which the State imposes, such as the right of its residents to sue in its courts, non-resident corporations *doing business within the State* certainly cannot be enforced against it.

The appellant never expressly authorized the Secretary of State to receive process in its behalf, and while this Court in *Pennsylvania Fire Insurance Company* v. *Gold Issue Mining Company,* 243 U. S., 96, held that a consent to be sued on a transitory cause of action accruing outside of the State might reasonably be implied from the execution of a power of attorney designating a State official as its agent to receive process in its behalf, no case has yet been found which holds that when a foreign corporation designates Jones as its agent to receive process in its behalf, that instrument may be reasonably construed to mean that Smith may be served with such process if Jones is not conveniently available, although no relation of agency exists between Smith and the corporation and the cause of action accrued beyond the State.

This Court refused to sanction the service of process upon a State official in the *Simon* case and in *Old Wayne Mutual Life Association* v. *McDonough* as to causes of action which accrued beyond the State, even though the companies involved in these cases were actually doing business within the State in violation of its laws.

Surely the application for a license to do business lawfully within a State cannot subject the applicant to a greater liability than it would incur if it had actually transacted business there without authority and in violation of its laws.

If the appellant had actually done business in New Jersey without authority from the State under the *Simon* and *Old Wayne* cases, the attempted service on the Secretary of State would be void because the cause of action sued upon did not accrue in the State of New Jersey.

It is, therefore, entirely unreasonable to suppose that such a service in such a case can be upheld as valid where the appellant never did business in the State, but was only authorized or licensed to do business there at some future time.

In *Smolik* v. *Philadelphia & Reading Coal & Iron Company*, 222 Fed., 148, and in *Pennsylvania Fire Insurance Company* v. *Gold Issue Mining Company*, 243 U. S., 96, a consent to be sued upon any transitory cause of action was implied from the designation of a specified agent to receive process in behalf of the corporations there involved and from the actual transaction of business within the State where the specified agent in those cases was served.

But the Court did not suggest that a consent that Smith might be served with process might or could be implied from the designation of Jones as the company's resident agent, and we are confident no court will ever so decide.

If the attempt is made to apply the same type of reasoning to the case at bar as that applied by Mr.

Justice HOLMES in *Pennsylvania Fire Insurance Company* v. *Gold Issue Mining Company*, 243 U. S., 96, the attempt will fail because of the vital difference in the facts of each case.

We may safely concede, as was suggested in that case, that if by a corporate vote the complainant here did accept service in this specific case, there would be no doubt of the jurisdiction of the State court over a transitory cause of action on contract.

We might also with safety concede that if the complainant had voluntarily appeared in the New Jersey court it would be unable to complain of the jurisdiction of that Court.

It is entirely sufficient for the purposes of this case that the facts show that the complainant never consented by a corporate vote or by any other voluntary act to be served with process in the State of New Jersey.

The next suggestion in the *Pennsylvania Fire Insurance Company* case was that there would be equally little doubt of the existence of jurisdiction "if it had appointed an agent authorized in terms to receive process in such cases."

In that case it did "appoint an agent in language that rationally might be held to go to that length."

The language was held to go to that length by the Court of last resort of the State and its decision construing the instrument there involved and its own State statutes was not disturbed by this Court.

But in that case the company had done business within the State where it was served with process, and when served had outstanding unsatisfied obligations in that State. It had actually designated by a written power of attorney as its agent for that purpose the official served with process in its behalf.

Here, however, the agent designated was not served at all.

The company did not do business in the State and had no obligations outstanding therein of any kind or character.

And no State or other court has decided that when the appellant designated Church as its agent to receive process in its behalf it consented that service might be made upon the Secretary of State if Church was absent or not conveniently available.

The result is that it is impossible to apply the reasoning used in the *Fire Insurance Company* case to the case at bar, because of the vital differences in the two cases.

In *American Oil & Supply Company* v. *Western Gas Construction Company*, 239 Fed., 505 (2nd C. C. A., January 9, 1917), a new Jersey corporation sued an Indiana corporation in the Supreme Court of the State of New York upon a cause of action which accrued in Indiana.

In 1907 the defendant had designated a person upon whom process might be served in its behalf within the State of New York.

This agent having disappeared, service was made upon one Steinmueller as the managing agent of the defendant under Section 432, subdivision 3 of the New York Code of Civil Procedure.

The cause was removed to the Federal Court for the Southern District of New York and a motion made to set aside the service of the summons, upon the ground that Steinmueller was not in fact the managing agent of the defendant.

Judge Augustus N. Hand found that the company had done business within the State of New York, but that Steinmueller was only a sales agent, without discretionary powers, acting throughout under the orders and control of the company's home office in Indiana.

The Circuit Court of Appeals affirmed the order of the District Court, which set aside the service of process, and said at page 507:

> "The fact that in 1915 he had made one contract, in the absence of proof that he was not then acting without specific directions and that the New

> York City Directory since 1912 had described him as agent, were not sufficient to overcome the positive affidavits submitted by the defendant that it had no office, property, nor any agent within the State, except Steinmueller, a sales agent."

Beach v. *Kerr Turbine Company,* 243 Fed., 706 (District Court, Northern District of Ohio, April 4, 1917), contains an interesting opinion by Judge WESTENHAVER.

The Court upheld the service of process in that case upon one engaged in installing certain machinery in the State of Ohio and decided that such a person was, for the purpose of the service of process, a managing agent of the defendant, which is a foreign corporation.

In this respect, the decision was probably erroneous (*York Manufacturing Company* v. *Colley,* 247 U. S., 21); but in the course of the opinion the Court commented upon the tendency of modern decisions to hold that whatever is reasonably effective to give actual notice to the corporation of the pendency of the suit constitutes valid service and due process in the constitutional sense (p. 708).

The Court, at page 709, quoted a brief excerpt from the opinion of Mr. Justice GRAY in *Barrow Steamship Company* v. *Kane,* 170 U. S., 100-106, in which it was said:

> "The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."

To be on the same footing with natural persons is one thing, but to be bound by service on the Secretary of State under the facts of this case is quite another.

Suppose the plaintiff here were an individual named Essanay and that in 1910 he had designated Durant Church to accept the service of process for him.

Would the most active imagination suggest that such an act on the part of Essanay would enable the defend-

ant here to obtain jurisdiction over him by sending a copy of the process intended for him to the Secretary of State?

The mere statement of the proposition demonstrates its absurdity.

The complete ineffectiveness of the method actually adopted in the case at bar to give actual notice to the appellant of the pendency of the suit is apparent from the fact that it had no actual knowledge or notice of its pendency until judgment had actually been or was immediately about to be entered against the company.

Atchison, Topeka & Santa Fe Railway Company v. *Weeks*, 248 Fed., 970 (District Court, Western District of Texas, January 25, 1918), is an interesting contribution to the subject.

The Atchison, Topeka & Santa Fe Railway Company brought suit in the Federal Court in Texas against Weeks and others to restrain the enforcement of a judgment procured by the defendants against it in the State Court in Texas.

The State Court suit was brought by a citizen of California to recover damages for injuries which subsequently resulted in his death, sustained while in the employ of the Railway Company in California.

The Railway Company is a Kansas corporation.

The Court found that it was actually doing business in the State of Texas and that process was served upon a person in Texas who was in fact the general manager of the Railway Company in charge of its business at that place.

For these reasons the Court held that the service of process was valid and denied the injunction prayed for.

In determining whether or not the company had by legal service been brought within the jurisdiction of the State Court, the Court, at page 976, said:

> "If it had not, the injunction prayed for should be granted, for it requires no citation of authorities to maintain the proposition that a judgment ren-

dered against a foreign corporation without notice to it as prescribed by law is not due process of law and is void, being in contravention of the Fourteenth Amendment of the Constitution of the United States." * * *

"It is well settled that foreign corporations can be served with process within the state only when doing business therein, and that such service must be upon an agent who represents the corporation in such business" (citing cases).

"Therefore," said the Court, "the question of service in the State Court may be divided into three propositions: (1) Were the persons served such officers or agents of the Atchison Company as the statutes of the state provide may be served; (2) Was the Atchison Company at the time of service doing business in the State of Texas; (3) If so, did the person served represent said Atchison Company in such business?"

Having decided each of the questions in the affirmative, the Court, at page 979, said:

"I do not agree with the contention of plaintiff that the service on Parker was invalid, because the cause of action upon which suit was brought in the State Court arose outside of the State of Texas. The cases of *Old Wayne Life Association* v. *McDonough*, 204 U. S., 22, 27, and *Simon* v. *Southern Railway*, 236 U. S., 115, cited in favor of this proposition, are not in point.

"*In these cases 'substituted service' was had and in neither case was service had upon an agent of the corporation, and therefore, if good at all, it could be good only in causes of action arising out of the business of the corporation in the State in which suit was brought.* It is not believed that any decision of any Federal Court can be found holding that where service was had upon the agent of the foreign corporation doing business within the state where suit is brought, such service is not good, because the cause of action did not arise in that state.

"The statutes of the various states providing for service upon foreign corporations seem to be

> based upon the theory that an agent doing the business of a foreign corporation in a state brings the corporation itself into the state *and that it may fairly be presumed that such agent would inform the governing body of the corporation of any service of citation upon him.*
>
> *"No such presumption may be indulged in cases where there is substituted service upon an official of the state and not upon an agent of the corporation."*

The Circuit Court of Appeals in the Sixth Circuit rendered a decision in *General Investment Company* v. *Lake Shore, etc., Railway Company*, 250 Fed., 160, 164, 165 (February 16, 1918), much to the same effect.

The Court in this case said:

> "A foreign corporation is not amenable to personal process in a court of another state, unless it is doing business in such state, and such process is served upon an authorized officer or agent (citing cases, among others, *Philadelphia Railway* v. *McKibbin*, 243 U. S., 264, 265). To render it so amenable there must be an actual doing of business within the state of such character and extent as to warrant the inference that it has subjected itself to the jurisdiction and laws of such state and is there present, subject to the process of its courts (citing cases)."

Even if the Essanay Company had engaged in business after it had designated Durant Church as the person upon whom process in its behalf might be served within the State of New Jersey, it would, nevertheless, not be amendable to the process which the appellee here attempted to serve upon it, inasmuch as the company was not at the time of service of process engaged in the transaction of business within the State and at that time had no agent or representative of any kind within its borders. This appears not only from the cases already cited, but particularly from the two cases to which attention is about to be called.

In *Partola Manufacturing Company* v. *Norfolk & W. Railway Co.*, 250 Fed., 273 (District Court, Southern District of New York, July 2, 1918), Judge MAYER held that a foreign corporation which had formerly maintained an office in New York, where it solicited business, cannot be deemed to be "doing business" in that State during the period when it was dismantling its office and preparing to abandon its activities pursuant to an order of the United States Director General of Railroads.

The Court, therefore, granted a motion to set aside the service of the summons upon the General Eastern Agent of the company made within the City of New York.

It appeared that the defendant had no railroad in the State and had never made application for authority to do business there, nor had it ever designated any person to receive service in its behalf within the State.

The action was brought to recover approximately $3,500 by the transferee of a bill of lading which called for delivery at New York City of a shipment of caustic soda consigned from Saltville, Virginia.

The point of the decision was

> "* * * whatever in the way of 'doing business' had theretofore gone on had ceased on April 25th, 1918, as the result of the taking over of the railroad by the Government."

April 25, 1918, was the date on which process was served.

Even in a case where a corporation formerly transacted business in a foreign State, service on its president in that State after it has ceased to do business there has been held to be ineffective.

These and similar rulings are based upon the theory that if the foreign corporation has ceased to do business within a foreign State, it can no longer be said to be present there in the sense in which that term has been used in the authorities and cannot be rendered amenable to the process of the courts of such foreign State.

If this is the law, as it undoubtedly is, with reference to the service of process upon the president or some other actual agent and real representative of the corporation, how much more must it be true with reference to the service of process upon a State official who has never been voluntarily designated by the corporation to act as its agent or to receive process in its behalf.

In *Golden, et al.*, v. *Connersville Wheel Company, et al.*, 252 Fed., 904 (District Court, Southern District of Michigan, September 11, 1918), a motion was made to set aside the service of process made under the following circumstances:

The plaintiff was a Michigan corporation. Defendants were Indiana corporations. The action was brought in the Circuit Court of Wayne County within the Southern District of Michigan.

Process was served upon one Hall, who was the president of one of the defendants and vice-president of the others, while Hall was a resident of Indiana temporarily in Wayne County, Michigan.

The Court, at page 907, said:

> "When it is sought to obtain a personal judgment in one state against a corporation organized under the laws of another state, two facts must affirmatively appear: First, that such foreign corporation was *at the time of the attempted service* upon it engaged in doing business within the state in which such service was made, to such an extent and of such a nature as to warrant the inference that the corporation is present within such state and has subjected itself to the jurisdiction thereof; and second, that the proper process has been served upon a duly authorized agent of such corporation" (citing many cases).

There was no doubt of the actual agency of the person served in that case, since he was the president of one company and vice-president of the others, but the Court found that, although the defendants had done business

within the State, yet they were not so engaged when process was served, and the Court granted the motion.

Among the cases cited to sustain this last proposition is the case of *People's Tobacco Company, Ltd.*, v. *American Tobacco Co.*, 246 U. S., 79.

The People's Tobacco Company began a suit against the American Tobacco Company in the District Court of the United States for the Eastern District of Louisiana to recover treble damages under Section 7 of the Sherman Act of 1890.

On January 5th service of process was made upon W. R. Irby as manager of the company.

On January 16th the company filed exceptions to the service on the ground that it was a corporation organized under the laws of the State of New Jersey; that it was not found within the Eastern District of Louisiana or in the State of Louisiana and was not engaged in business there, nor had it an agent therein; that W. R. Irby, upon whom service had been attempted, was not an officer, agent or employee of the defendant or authorized to accept service of process upon it at that time.

On January 25, 1912, service was made upon the Assistant Secretary of State of Louisiana, and later a further service was attempted upon the Secretary of State in Louisiana, to all of which exceptions were duly filed by the defendant company.

Testimony was taken in the District Court, from which it appeared and from which the Court found:

1. That Irby was not the agent of the company at the time of the attempted service, and therefore that the service upon him did not bring the company into court.

2. That the American Tobacco Company was not doing business in Louisiana at the time of the attempted service; and

3. That the attempted service upon the Secretary of the State of Louisiana did not bring the defendant corporation into court.

And yet the testimony showed that up to November 30, 1911, a brief period of less than sixty days from the date of the service of process, the American Tobacco Company had a factory at New Orleans for the manufacture of tobacco and cigarettes known as "The W. R. Irby Branch of the American Tobacco Company," of which W. R. Irby was manager.

Under the law of Louisiana it had filed in the office of the Secretary of State an appointment designating Irby as the agent upon whom service of process might be made.

On November 16, 1911, however, the Circuit Court of the United States for the Southern District of New York had made a decree dissolving the American Tobacco Company, and among other things that decree provided that the American Tobacco Company should convey its W. R. Irby Branch to a company to be formed known as "The Ligget-Myers Tobacco Company."

Conveyances were made to carry out this purpose and it appeared that the American Tobacco Company by an instrument executed by its vice-president revoked the authority of Irby as its resident agent and filed the revocation of authority in the office of the Secretary of State on December 15, 1911.

Other facts are detailed in the opinion which indicate that the case might be regarded as an extremely close one, presenting many doubtful elements, none of which appear in the case at bar.

The Court first disposed of the suggestion that the revocation by the defendant's vice-president of Irby's authority as the designated agent of the defendant to receive process in its behalf was not duly authorized.

In doing so, the Court said it was not impressed with the argument that this revocation was ineffectual

because not sanctioned by formal action of the Board of Directors of the Company.

This part of the decision makes it clear that any action on the part of the corporation which would reasonably support the inference of revocation or abandonment would be sufficient for that purpose, and in a case such as the case at bar, where it appears that at no time since the year 1910, when its designation of Durant Church was made, had it ever exercised or invoked any of the privileges accorded to it by its authorization to do business within the State. The only reasonable inference to be drawn from the facts, particularly from the fact that it never transacted any business of any kind or character within the State, is that the corporation had long since abandoned its license to do business within that State.

Upon the broader question involved in the case, the Court said that it agreed with the District Court in holding that the American Tobacco Company at the time of the attempted service was not doing business within the State of Louisiana.

At pages 86 and 87 the Court said:

> "The question as to what constitutes the doing of business in such wise as to make the corporation subject to service of process has been frequently discussed in the opinions of this court, and we shall enter upon no amplification of what has been said. Each case depends upon its own facts. *The general rule deducible from all our decisions is that the business must be of such a nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is by its duly authorized officers or agents present within the state or district where service is attempted* (*Philadelphia & Reading Railway* v. *McKibbin*, 243 U. S., 264; *St. Louis Southwestern Railway Co.* v. *Alexander*, 227 U. S., 218-226). * * *
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> * * * As to the continued practice of advertising its wares in Louisiana and sending its

soliciting agents into that state, as above detailed, the agents having no authority beyond solicitation, we think the previous decisions of this court have settled the law to be that such practices do not amount to that doing of business which subjects a corporation to the local jurisdiction for the purpose of service of process upon it (*Green* v. *Chicago, Burlington & Quincy Railway Co.*, 205 U. S., 530; *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S., 264, 268). * * *

As to the attempted service of process upon the Secretary of State of Louisiana under the Louisiana Act of 1904 (Laws of 1904, Act No. 54, page 133), as amended 1908 (Laws 1908, Act No. 284, page 423), we understand the act, as construed by the State Supreme Court, is not applicable to foreign corporations not present within the state and doing business therein at the time of the service, and having as in this case withdrawn from the state and ceased to do business there (*Gouner* v. *Missouri Valley Bridge & Iron Company*, 123 Louisiana, 964)."

The Court concluded that the District Court did not err in sustaining the exceptions filed by the defendant company and in quashing the attempted service made upon it.

We are unable to distinguish the principles which control this case from those which in our judgment control the case at bar.

We are unable to find any basis whatever to support the service of process attempted to be made in the case at bar.

Tested by every principle applicable to the subject, there appears to be a total absence of any reasonable excuse or ground to sustain the validity of the attempted service of the process relied upon.

It follows that the decree appealed from should be reversed, with direction to the District Court to grant a permanent injunction in accord with the prayer of the complaint.

April 20th, 1921.

Respectfully submitted,

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